Sommer Awning Company, Inc. *and* Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO. Cases 25–CA–25562–1, 25–CA–25665, and 25–CA–25879

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On November 30, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and an answering brief.

On May 11, 2000, the Board issued its decision in *FES,* 331 NLRB No. 20, setting forth the framework for analysis of refusal-to-hire violations. On June 14, 2000, the Board invited the parties to this proceeding to file supplemental briefs addressing the *FES* framework as it applies to the record in this case. The General Counsel filed a supplemental brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent refused to hire approximately 20 applicants for employment.[3] The judge's finding is consistent with our decision in *FES*. In *FES*, 331 NLRB No. 20, slip op. at 4, we held that the General Counsel must establish the following elements to meet his burden of proof in a discriminatory refusal-to-hire case:

> The respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct.
>
> The applicants had experience or training relevant to the announced or generally known requirements of the positions for hire.
>
> Antiunion animus contributed to the decision not to hire the applicant.

In the instant case, the parties stipulated as follows:

> Named discriminatees applied for employment with the Respondent and were qualified for a job for which the Respondent was seeking applicants.
>
> After the Respondent refused to hire the discriminatees, the positions for which they applied remained open, and the Respondent continued to seek applicants for the positions.
>
> After the Respondent refused to hire the discriminatees, the Respondent hired individuals who were no better qualified than the discriminatees to fill the positions which remained open after the Respondent refused to hire the discriminatees.
>
> The Respondent refused to hire the discriminatees because of their participation in the Union's organizing program.

We find that the *FES* elements have been established in this case. The stipulations set forth above show that the Respondent was seeking applicants when it refused to hire the discriminatees and, in fact, thereafter hired applicants for the positions for which the discriminatees applied. Thus, the Respondent was hiring at the time of the alleged unlawful conduct.

These stipulations also show that the discriminatees were as well qualified for the positions for which they applied as the individuals who were hired. Thus, the discriminatees had the experience or training relevant to the requirements of the positions for hire.

Further, the Respondent's antiunion animus contributed to its decision not to hire the discriminatees. The Respondent's animus is established by the stipulation

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify par. 1(a) of the judge's recommended Order to track the judge's finding that the Respondent told an employee he would be considered for rehire "if he cut his ties with the Union."

In par. 2(f) of the recommended Order, the judge inadvertently referred to Eric Harris as the person whose job offer was rescinded. The Respondent rescinded an offer it made to Kurt Tucker. We correct this inadvertent error.

We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Member Hurtgen agrees with the judge that the 20 overt union applicants whom the Respondent refused to hire or consider for hire are not temporary employees. He would find, however, that the judge erred in concluding that these applicants, who were participants in the Union's Youth-to-Youth organizing campaign, would continue to work for the Respondent beyond 6 months. The record shows that the Youth-to-Youth program involves 6-month leaves of absence for the purpose of organizing nonunion employers. Member Hurtgen would find that the terms of the Youth-to-Youth program should be considered in determining backpay for these discriminatees.

[3] Including Kurt Tucker, to whom the Respondent initially offered a job, which it later rescinded.

that it refused to hire the discriminatees because of their participation in the Union's organizing program.

Based on the foregoing, we find that the General Counsel has met his burden of establishing the necessary elements of an unlawful refusal to hire under the *FES* framework. Once the General Counsel has established his case, the burden shifts to the Respondent to demonstrate that it would not have hired the discriminatees even in the absence of their union activities or affiliation. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982). We agree with the judge, for the reasons stated by him, that the Respondent failed to meet its *Wright Line* burden of showing that it would not have hired the discriminatees even in the absence of their union activity.

Accordingly, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(3) of the Act by refusing to hire the job applicants listed in the stipulation.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Sommer Awning Company, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Notifying employees that it would stringently apply a rule against the falsification of employment applications.

(b) Informing employees that they would not receive pay increases because of their participation in the Union's organizing program.

(c) Telling an employee that he would be considered for rehire if he cut his ties with the Union.

(d) Applying a rule against falsifying employment applications so as to discriminate against job applicants and employees because they participated in the Union's organizing program or because of their union affiliation.

(e) Changing its hiring process to add a cover sheet to all employment applications advising employment applicants that it will verify all reported employment references, so as to discriminate against them because they participated in the Union's organizing program or because of their union affiliation.

(f) Refusing to hire job applicants because they participated in the Union's organizing program or because of their union affiliation.

(g) Discharging or otherwise discriminating against employees because they participated in the Union's organizing program or because of their union affiliation.

(h) Rescinding employment offers because the prospective employee has participated in the Union's organizing program or because of his union affiliation.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their stead.

(b) Make whole all those individuals identified in subparagraph (a) above in the manner described in the remedy section of the decision.

(c) Within 14 days from the date of this Order, offer Eric Harris and Frank Danforth full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(d) Make whole Eric Harris and Frank Danforth in the manner described in the remedy section of the decision.

(e) Within 14 days from the date of this Order, offer Kurt Tucker employment in the position that was offered to him, then rescinded, and if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges; if necessary terminating the service of any employee hired in his stead.

(f) Make whole Kurt Tucker for the position that was offered to him, but rescinded, in the manner described in the remedy section of the decision.

(g) Rescind, during the notice posting period, the rule against falsifying employment applications and thereafter ensure that if it is repromulgated and reimplemented, it is done in a nondiscriminatory manner, regardless of the employee's union affiliation or membership in a union.

[4] In his Conclusion of Law 5(a), the judge stated that the Respondent violated Sec. 8(a)(3) and (1) by "refusing to hire or consider for hire" the job applicants in question. As discussed above, we conclude that, under the *FES* framework, the evidence establishes a refusal-to-hire violation. It is unnecessary to decide whether the Respondent also violated the Act by unlawfully refusing to consider the applicants because the remedy for such a violation would be subsumed within the broader remedy for the refusal-to-hire violation. See *FES*, 331 NLRB No. 20, slip op. at 7. The judge's conclusion of law is modified accordingly.

(h) Rescind, during the notice posting period, the hiring practice of attaching a cover letter to all employment applications informing employment applicants that all reported employment references will be verified and thereafter ensure that if it is repromulgated and reimplemented it is done in a nondiscriminatory manner, regardless of the applicant's union affiliation or membership in a union.

(i) Within 14 days from the date of this Order, remove from its files the following: any reference to the unlawful refusal to hire Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward; any reference to the unlawful discharges of Eric Harris and Frank Danforth; and any reference to the unlawful rescission of the employment offer made to Kurt Tucker; and, within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(j) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Indianapolis, Indiana facility copies of the attached noticed marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 25, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 1997.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT notify employees that we will stringently apply a rule against the falsification of employment applications.

WE WILL NOT inform employees that they will not receive pay increases because of their participation in the Union's organizing program.

WE WILL NOT tell employees that they would be considered for rehire if they cut their ties with the Union.

WE WILL NOT apply a rule against falsifying employment applications so as to discriminate against job applicants and employees because they participated in the Union's organizing program or because of their union affiliation.

WE WILL NOT change our hiring process by adding a cover sheet to our employment applications advising applicants that we will verify their reported employment references, so as to discriminate against any applicant because he participated in the Union's organizing program or because of his union affiliation.

WE WILL NOT refuse to hire job applicants because they participated in the Union's organizing program or because of their union affiliation.

WE WILL NOT discharge or otherwise discriminate against employees because they participated in the Union's organizing program or because of their union affiliation.

WE WILL NOT rescind any offer of employment because the prospective employee participated in the Union's organizing program or because of his union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they would have enjoyed had they been hired.

WE WILL make whole Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward for any loss of earnings and other benefits that they may have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Eric Harris and Frank Danforth to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Eric Harris and Frank Danforth for any loss of earnings and other benefits that they may have suffered as a result of their unlawful discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Kurt Tucker in the position that was offered to him and that he would have performed had we not unlawfully rescinded his offer of employment, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges that he would have enjoyed had we not rescinded his offer of employment.

WE WILL make whole Kurt Tucker for any loss of earnings and other benefits that he has suffered as a result of the unlawful rescission of his offer of employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward; any reference to the unlawful discharges of Eric Harris and Frank Danforth; and any reference to the unlawful rescission of an offer of employment made to Kurt Tucker, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL rescind our rule against falsifying employment applications and thereafter WE WILL ensure that if it is repromulgated and reimplemented, it is announced and applied in a nondiscriminatory manner, regardless of the employee's union affiliation or membership in a union.

WE WILL rescind the hiring practice of attaching a cover sheet to all employment applications informing employment applicants that all reported employment references will be verified and thereafter WE WILL ensure that if it is repromulgated and reimplemented, it is announced and applied in a nondiscriminatory manner, regardless of the employment applicant's union affiliation or membership in a union.

SOMMER AWNING COMPANY, INC.

Michael T. Beck, Esq. and *Alan L. Zmija, Esq.,* for the General Counsel.

Todd M. Nierman, Esq. and *Philip J. Gibbons Jr., Esq.,* of Indianapolis, Indiana, for the Respondent.

Neil Gath, Esq., of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on August 24 and 25, 1998. The charge in Case 25–CA–25562–1 was filed on August 28, 1997, and was amended on October 7, 1997. The charge in Case 25–CA–25665 was filed on September 30, 1997, and was amended on November 26, 1997. The charge in Case 25–CA–25879 was filed on February 27, 1998, and was amended on April 22, 1998. An order consolidating cases, consolidated complaint and notice of hearing, was issued on April 28, 1998, and the consolidated complaint was amended on August 10, 1998.

The amended complaint alleges that Sommer Awning Company, Inc. (Respondent) violated Section 8(a)(1) of the Act, on the following dates and in the following manner: on July 21,[1] when the Respondent's president, Steven Sommer, threatened to close the business if the employees selected Sheet Metal

[1] All dates are in 1997 unless otherwise indicated.

Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO (Union) as their collective-bargaining representative; on July 22, when Sommer posted a document on the Respondent's bulletin board notifying employees that the Respondent intended to stringently enforce a rule prohibiting the falsification of employment applications; on August 25, when the Respondent's production manager, Christen Gober, told employees Eric Harris and Terry Banks that they would not receive a pay increase because they had omitted information concerning their union membership from their employment applications; and on August 27, when Installer Foreman Andy Colvin told employee Eric Harris that he would be considered for rehire if he abandoned his support for and activities on behalf of the Union.

The amended consolidated complaint further alleges that between April and November 1997, the Respondent violated Section 8(a)(3) of the Act: (1) by refusing to hire or consider for hire several union organizers who overtly applied for employment; (2) by stringently enforcing a rule concerning the falsification of employment applications; (3) by discharging two covert "salts," Eric Harris and Frank Danforth, after they announced their union affiliation; (4) by changing its hiring procedure on October 21, by adding a cover sheet to its employment application which stated that all employment references would be verified; and (5) by rescinding an offer of employment on November 3, to overt union applicant Kurt Tucker.

The Respondent's answer and amended answer essentially deny the material allegations of the amended consolidated complaint. The parties were afforded a full opportunity to appear at the hearing, present evidence, examine and cross-examine witnesses, and file posthearing briefs.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Indiana corporation, is engaged in the manufacture, sale, and distribution of fabric awnings with an office and place of business in Indianapolis, Indiana, where it annually sells and ships, and purchases and receives, goods valued in excess of $50,000, respectively, directly to and from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. The Youth-to-Youth program

In conjunction with a union organizing resolution passed in July 1990, the Union established the Youth-to-Youth program to enhance its organizing efforts by salting. The Youth-to-Youth program requires every individual enrolled in the Union's 5-year apprenticeship program to take a leave of absence from the apprenticeship program in order to work for 6 months as a paid organizer for the Union.[3] As an employee of the Union, an organizer is paid the same hourly wage that he received as an apprentice under the multiemployer collective-bargaining agreement, plus the hourly wage paid by the nonsignatory employer, if he is successful in obtaining employment with a nonunion company. Under the Youth-to-Youth program, organizers are required to continuously seek employment with nonunion contractors, whenever they are not working for one. Once hired by a nonunion employer, they are instructed to work hard, do a good job, and tell their coworkers during nonworking hours about the benefits of belonging to the Union.

Organizers can apply for employment either overtly or covertly. When applying overtly, the organizer typically wears a union hat, T-shirt, or button, applies in a group, and submits an employment application which reflects his union affiliation and apprenticeship. When applying covertly, the organizer wears nothing disclosing his union membership, applies alone, and conceals his union apprenticeship from the prospective nonunion employer.

2. The Company's response to salting

a. The overt union applicants

The Respondent's operations are divided into four departments: production, graphic design, sales/marketing, and administrative. At issue here is the production department, which consists of three sections: soft production, welding, and installation. In early 1997, there were approximately 16 employees in the production department. By spring 1997, the number of employees had increased to 25. Between April-November 1997, high turnover among the new hires required the Respondent to continue hiring new employees for the production department.

During this time, 20 Youth-to-Youth organizers overtly applied for employment. At various times between April-October 1997, two or three organizers wearing union hats, T-shirts, and/or buttons visited the Respondent's offices and submitted individual employment applications for welder, installer, fin-

[2] Respondent's counsel filed a motion in limine seeking to preclude the introduction of evidence concerning the qualifications, training, experience, or background of individuals, who applied or were hired by the Respondent from April 1, 1997, to the present, unless the General Counsel could match the applicants with available jobs for which they were qualified. Respondent's counsel further asserted that in some instances there were no positions at the time the individuals applied for employment and in other instances the applicants were not qualified for the available positions. Respondent relies on the evidentiary scheme established in *NLRB v. Fluor Daniel, Inc.,* 102 F.3d 818 (6th Cir. 1996), as the underlying legal basis for its motion. After oral argument at the hearing, I denied the motion in limine as a matter of law for the reason that the evidentiary scheme adopted by the Sixth Circuit in *Fluor Daniel,* supra, conflicts with settled Board law on the issue, which the Supreme Court has not reversed. Therefore, I am bound to apply established Board precedent. *Norman King Electric,* 324 NLRB 1077, 1084 (1997).

[3] By agreement between the Union and the signatory contractors to a collective-bargaining agreement, an apprentice leaves his job with a signatory contractor to work for the Union and in most cases, the apprentice returns to his job with the same signatory contractor after 6 months.

isher or "any" position that was available. Many of the organizers attached typed resumes to their completed employment applications which listed the signatory contractors for whom they previously worked and identified that they were presently employed as organizers for the Union. Several union organizers were told they would be contacted for an interview, but never were. Many checked on the status of their applications in person, sometimes more than once, while others checked by phone. In either case, none was contacted by the Respondent.

With respect to the 20 overt union applicants, the Respondent, Union, and counsel for the General Counsel introduced into evidence written stipulations (Jt. Exh. 2) admitting that the following facts were true and accurate:

> 1. The following individuals applied for employment with Respondent on the dates set forth opposite their respective names, and the individuals were qualified for a job for which Respondent was seeking applicants:
>
> | | |
> |---|---|
> | Robert Bond Jr. | April 14, 1997, August 8, 1997 |
> | Kerry Bowling | April 14, 1997 |
> | Brian Campbell | April 14, 1997 |
> | M. John Maynard | April 14, 1997 |
> | David Walker | April 14, 1997 |
> | Charles M. Miller | May 14, 1997 |
> | Robert Reed | July 24, 1997 |
> | Monty Shoulders | July 24, 1997 |
> | Charles Baldwin | August 8, 1997 |
> | Christopher H. Meyers | August 8, 1997 |
> | Jason Wildrick | August 8, 1997 |
> | Spencer Irving III | August 11, 1997 |
> | Anthony Turner | August 11, 1997 |
> | William Rogers | September 23, 1997 |
> | Dennis Wheeler | September 23, 1997 |
> | Michael Crull | September 24, 1997 |
> | Travis Dick | September 24, 1997 |
> | Kurt Tucker | October 2, 1997 |
> | Mark Moran | October 21, 1997 |
> | Daniel W. Steward | October 21, 1997 |
>
> 2. None of the individuals listed above in Stipulation 1 were ever employed or offered employment by Respondent.
>
> 3. Respondent refused to hire or consider for hire the individuals named above in Stipulation 1 because of those individuals' participation in Sheet Metal Workers' International Union Local No. 20's organizing program.[4]
>
> 4. After Respondent refused to hire or consider for hire the individuals listed above in Stipulation 1, the positions for which they respectively applied remained open, and Respondent continued to seek applicants for said positions who had no better qualifications than the qualifications of any of the individuals named in Stipulation 1.
>
> 5. Respondent did hire individuals, who are listed in Joint Exhibit 1, on the dates indicated in Joint Exhibit 1, to fill the positions described above, and said individuals who where hired were no more qualified to perform their job duties for Respondent than any of the individuals named above in Stipulation 1.[5]
>
> 6. For the purpose of these stipulations the term "qualified" means that an individual possessed the necessary skills, training and experience to perform the work for which Respondent was seeking applicants.

b. Rescinding the employment offer to Kurt Tucker

Youth-to-Youth organizer Kurt Tucker overtly applied for employment on October 2, 1997. He was accompanied by union organizer Michael Crull. They wore union hats and spoke with a receptionist named Patty. Tucker completed an employment application, while Crull checked the status of an application that he had submitted earlier.

Human Resources Specialist Vicki Kimsey was not available to interview Tucker on the day that he applied, but phoned him later to set up an interview. On October 16, Tucker told Kimsey in an interview that he was currently employed as a union organizer as reflected in his employment application. He further advised that he was working for a temporary employment agency. After interviewing with Kimsey, Tucker spoke with Production Manager Christen Gober, who explained that various positions were available.

Although Tucker was not offered a position immediately, Gober left him a phone message on October 23 offering him a job in soft production at $8 an hour. Tucker called Gober to accept the position, and explained that he needed to speak with his current employer about the possibility of leaving his job with less than a week's notice. Gober asked Tucker to call him the next day to arrange a start date. The following day, Tucker called Gober and left a message with a secretary that he would begin work on October 27.

Tucker reported for work as scheduled on October 27 wearing a union hat with a union pencil sticking out of his pocket. Minutes later, he encountered Gober, who asked him to step into a small room. Gober asked Tucker what he was doing there. He denied offering a job to Tucker and told him that he never received his message about starting work on October 27. Gober told Tucker that he would let him know whether he still had a job for him.

On October 30, 3 days' later, Tucker called Gober to find out if he had a job. He left a message on Gober's voice mail, but Gober did not return the call. Tucker persevered by leaving several other messages and eventually he reached Gober, who stated that he was withdrawing the original offer because Tucker had a problem with communication. According to the stipulated facts, however, the Respondent rescinded its previous offer of employment to Kurt Tucker because of his participation in the Union's organizing program. (Jt. Exh. 2; Stip. Fc. 9.)

c. The covert union applicants

1. Jason Ellis

On April 14, 1997, union organizer Jason Ellis covertly applied for employment with the Respondent. A short time later,

[4] On August 18, 1997, the Union filed a petition to represent the Respondent's production employees.

[5] The names, hire dates, and departments listed in Jt. Exh. 1 are incorporated by reference as if more fully set forth here.

he was interviewed and hired. During his first month of employment, Ellis' work was never criticized by the Respondent, he was never disciplined, and he was given a pay raise. In mid-May, however, he told Gober that he was a union organizer. Gober promptly reported the news to his boss, Steve Sommer.

Soon afterwards, Sommer called Ellis to a meeting. He asked him why he was trying to put the Company out of business. He also told Ellis that if he had known that he was a union organizer, he would not have hired him. Sommer went on to say that the Respondent could not afford to unionize.

Following this meeting, Ellis was reassigned to nights, working alone, in the welding department. Gradually his work hours were reduced from 40 hours to 30 hours per week. After discussing the situation with Union Representative Michael E. Van Gordon, Ellis quit working for the Respondent.[6]

2. Eric Harris

Eric Harris was another Youth-to-Youth organizer who covertly applied for employment with the Respondent on May 28, 1997. He interviewed with Vicki Kimsey, human resource specialist, who explained the pay and benefits. He was also interviewed by Production Manager Gober. Even though Harris did not have any prior experience installing awnings, he was hired as an installer at $9.50 per hour.

Two weeks after he began work, Harris attended a routine Monday morning meeting in the installation department. As the meeting ended, he and Terry Banks, another covert organizer,[7] told Gober that they were union organizers. According to Harris, Gober shook his head and told them to go back to work.

The following Monday, July 21, another meeting took place, which was attended by Respondent's president, Steve Sommer. He told everyone at the meeting that there was a couple of union members among them. He also complimented Harris and Banks for doing good work and told them if they could steer clear of the Union, he would like them to continue working for the Respondent.

According to Harris, Sommer also told the employees that union wages were high, and if the Respondent had to pay union wages and dues, it was possible that the Company would go out of business. Sommer, however, denied making those remarks. For demeanor and other reasons, I credit his denial and find that Harris' testimony was unpersuasive.

First, Harris' testimony is not corroborated by his daily salt log which was completed and signed on the day that Sommer allegedly made the threat.[8] The daily log reveals no mention of the alleged threat. Asked to explain the omission, Harris unconvincingly asserted that he did not fully understand what should be included in the log. His response is unpersuasive because the evidence shows that the union organizers are told that it is important to be accurate in completing the form, since the information contained therein may be used in an affidavit. Next, Harris also failed to mention the alleged threat in handwritten notes that he made in August 1997. According to his testimony, the notes outlined "everything" that had occurred while he was employed by the Respondent. The dual omission in the writings made contemporaneous with the events involved renders Harris' testimony questionable. Finally, Harris' credibility is tainted by his admitted lack of candor in completing his employment application, which shows a proclivity toward coloring the truth to serve the Union's purposes. For these, and demeanor reasons, I do not credit Harris' testimony that Sommer told the employees the Company might close or go bankrupt if there was a Union.

On August 25, 1997, Gober told Harris that he would not receive a pay raise because of his participation in the Union's organizing program. (Jt. Exh. 2; Stip. Fc. 13.)[9] On August 27, 1997, 2 days' later, Gober and Installer Supervisor Andy Colvin, told Harris that he was being discharged because he had not taken any steps to obtain a commercial driver's license. (Jt. Exh. 2; Stip. Fc. 19.) The stipulated facts disclose, however, that the Respondent discharged Eric Harris because of his participation in [the Union's] organizing program. (Jt. Exh. 2; Stip. Fc. 7.) The stipulated facts also disclose that at the time of discharge, Colvin told Harris that he would be considered for rehire if he cut his union ties. (Jt. Exh. 2; Stip. Fc. 14.)

3. Frank Danforth

Frank Danforth covertly applied for employment on September 24, was hired as an installer, and began working for the Respondent on September 29, 1997. On Friday, October 3, he and Colvin worked together on the road. Colvin complimented Danforth for doing a good job. The following Monday, October 6, Danforth told Colvin that he was a union organizer. He was discharged 10 minutes later. Although the Respondent informed Danforth by letter, dated October 9, that he was discharged because he falsified his job application (Jt. Exh. 2; Stip. Fc. 20), the stipulated facts establish that he was discharged on October 6 because of his participation in the Union's organizing program. (Jt. Exh. 2; Stip. Fc. 8.)

d. The policy changes brought about by salting

On July 22, 2 days after Harris revealed he was a union organizer, a flyer anonymously was posted in the Respondent's facility warning employees that a union could cost friendships. At the same time, another document was posted by Sommer on a bulletin board notifying employees that the Respondent had a rule against falsifying employment applications and that any employee who falsified an employment application would be discharged. (Jt. Exh. 2; Stip. Fc. 10.) On the same day, the Respondent began to enforce the rule, something which had never

[6] The amended complaint does not allege, nor does the General Counsel argue, that the reassignment to nights violated the Act or that Ellis was constructively discharged.

[7] The record reflects that Banks was hired by Respondent in April 1997.

[8] The Youth-to-Youth organizers record their activities on various forms and logs provided by the Union. A "Job Application Report" is completed each time the organizer applies for a job with a nonunion contractor and a "Call Back Log Sheet" is completed each time an organizer checks on the status of his application with the nonunion employer. An "Interview Log Sheet" records details of any job interview and a "Daily Salt Log" enables the organizer, who is hired, to describe what he did on a daily basis and the comments made by supervisors.

[9] On August 23, Gober likewise told Terry Banks that he would not receive a pay raise because of his participation in the Union's organizing program. (Jt. Exh. 2; Stip. Fc. 12.)

before been done in the 9-year history of the Company. The stipulated facts disclose that the Respondent's conduct was in response to the applications it had received from the Youth-to-Youth organizers. (Jt. Exh.2; Stip. Fcs. 11 & 16.)

A few months later, on October 21, 1997, the Respondent implemented a change in its hiring procedures by adding a cover sheet to all employment applications which advised employment applicants that the Respondent would verify all employment references reported on their applications. (Jt. Exh. 2; Stip. Fc. 17.)

B. Analysis and Findings

1. The alleged threat to close the business or go bankrupt

Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. An employer violates this section when it makes statements that reasonably tend to coerce employees in the exercise of their protected rights, regardless of whether the statements do, in fact, coerce. *NLRB v. Shelby Memorial Hospital Assn.,* 1 F.3d 550, 560 (7th Cir. 1993). The amended consolidated complaint alleges that on July 21, Sommer told the employees at a regular Monday morning meeting that high wages and costly dues associated with having a union might force the Company to close or go bankrupt. This allegation is founded exclusively on the testimony of Eric Harris, which point for the reasons stated above, I do not credit his testimony on this issue. Accordingly, I shall recommend that the allegations contained in paragraph 5 of the complaint be dismissed.

2. The rule prohibiting the falsification of employment applications

The amended consolidated complaint alleges, and the evidence shows, that on July 22, 2 days after Harris and Banks revealed that they were union organizers, Sommer posted a notice on the employee bulletin board announcing that anyone found violating a rule prohibiting the falsification of information on employment applications would be discharged. The evidence shows that the rule was not widely publicized nor was it contained in the Company's employee manual. Rather, the policy appeared as follows at the end of the employment application:

> In signing this application, I certify that all of the foregoing information is a complete and accurate statement of the facts and understand that if any representation, omission or falsification be discovered, it will constitute grounds for dismissal. I hereby authorize you to conduct any investigation necessary concerning any part of my background related to the position I am seeking. I release all parties from any liability in connection with the provision and use of such information.

The evidence also shows that the Respondent had never sought to enforce this rule before it realized that it had hired two Youth-to-Youth organizers. Sommers testified, "[i]t is the first time after nine (9) years that I have ever had to implement a rule like that because we never had a situation where we have had this many people apply in this instance." (Tr. 337.) Indeed, the credible evidence establishes that the rule was announced and applied in response to the Union's organizing attempt.

Given the timing of the announcement and the stringent application of the rule, and in light of the evidence disclosing that prior to July 1997, the rule was laxly enforced, I find that the Respondent would not have reacted in the same manner in the absence of the Union's organizing activity and therefore it violated Section 8(a)(1) and (3) of the Act. See *McCullough Environmental Services,* 306 NLRB 345, 353 (1992).

3. The unlawful withholding of a pay raise

The Respondent argues that Harris and Banks were told that they would not receive a pay increase because their participation in the Youth-to-Youth program interfered with their ability to work for the Respondent. Contrary to the Respondent's assertions, however, the evidence shows that Harris and Banks were satisfactory workers, who had been complimented by Sommer for doing good work, and who had restricted their union activities to nonworking hours. In particular with respect to Harris, there is no evidence that the delay in obtaining a commercial driver's license (CDL) had affected his ability to perform the job.

The Respondent also argues that it withheld benefits from both union organizers because they falsified their employment applications. I have already found that the timing of the announcement and the stringent application of the rule violated the Act. The Respondent's rule, therefore, cannot stand as a lawful basis for withholding a benefit.

Accordingly, I find that the Respondent unlawfully told Banks and Harris on August 23 and 25, 1997, respectively, that they would not receive a pay increase because of their union activities in violation of Section 8(a)(1) of the Act.

4. The unlawful refusal to hire or consider for hire 20 overt union organizers

a. The legal standard

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[10] In a refusal to hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, that the employer harbored antiunion animus, and that it refused to hire the alleged discriminatee because of that animus. *Big E's Foodland,* 242 NLRB 963, 968 (1979). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence

[10] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

of protected activity or that the reasons for the decision are not pretextual. *T&J Trucking Co.,* 316 NLRB 771 (1995).

The Respondent, however, argues that under an evidentiary scheme delineated in *NLRB v. Fluor Daniel, Inc.,* 102 F.3d 818 (6th Cir. 1996), the General Counsel must also show that the applicant was qualified for a job for which the Respondent sought applicants and that the General Counsel "match up" the applicants with the jobs that were available. As noted earlier, the Sixth Circuit's evidentiary scheme conflicts with established Board precedent on point, which the Supreme Court has not reversed. Because this case does not arise in the Sixth Circuit, I am duty bound to apply Board precedent. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Ford Motor Co.,* 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 F.2d 993, 996–1002 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979).

b. The General Counsel's evidence

There is no dispute that all 20 overt union organizers submitted applications to the Respondent, that all were employed as union organizers at the time of application, and that none was hired by or offered a job with the Respondent. The evidence also shows that the positions for which the union applicants applied remained open, and that the Respondent continued to seek and hire applicants for those positions, who were no more qualified to perform the job than the union applicants.

In addition, the Respondent does not deny that it knew that the 20 overt applicants were union organizers. The evidence discloses that they wore union hats and union T-shirts when they applied, and that their applications (and attached resumes) unmistakably reflected that they were union organizers and/or that they had previously worked for union signatory contractors.

Rather, the Respondent asserts that there is absolutely no evidence of union animus in this case. I am unpersuaded by the argument for several reasons. First, the Respondent has stipulated that the overt union applicants were not hired because they participated in the Union's organizing program. (Jt. Exh. 2; Stip. Fc. 3.) That admission standing alone establishes that the decision was unlawfully motivated by antiunion bias.

Second, the unrebutted evidence discloses that on finding out that Harris and Banks were union organizers, Sommer told them that if there was any way that they could steer clear of the Union, he would like to see them continue employment with the Respondent. A reasonable implication of his comment is that if they did not steer clear of the Union, they no longer would be employed with the Respondent.[11] The following day, Sommer announced that for the first time in the Company's 9-year history that the Respondent was going to apply a rule prohibiting the falsification of employment applications and that anyone violating the rule would be discharged. The timing of the announcement, the stringent application of the rule, and its lax administration prior thereto, also supports a reasonable inference that it was motivated by antiunion animus.

Third, the unrebutted evidence shows that an hour after Ellis disclosed that he was a union organizer, he was called to a meeting with Sommer where he was asked why he was trying to put the Respondent out of business. Sommer also told Ellis that if he had known Ellis was a union organizer, he would never have hired him. Gober and Colvin likewise told Banks and Harris that they would not receive a pay raise (not because their work was poor), but because they were union organizers. A few days later, Colvin discharged Harris, but told him that he would be considered for rehire, if he cut his ties with the Union. Danforth likewise was summarily dismissed minutes after he disclosed that he was a union organizer. Thus, by the comments and conduct of its managers and supervisors, the Respondent manifested an antiunion animus.

In addition, Sommer testified that he told his front office personnel not to hire any union organizers because he considered them to be "temporary employees," who probably would quit after 6 months to go work for a union signatory contractor. There is no evidence, however, that Sommer told his front office personnel not to hire any other category, group, or individual, seeking employment, who on the face of their employment applications might be considered short-term employees. The carte blanche characterization of union organizers as "temporary employees" ineligible for hire warrants an inference of antiunion animus.

Thus, the total circumstances set forth above warrant an inference that the Respondent harbored antiunion animus and that its decision against hiring the 20 overt union organizers was motivated, in whole or part, by its antiunion animus. Accordingly, I find that the General Counsel has satisfied his initial evidentiary burden.

c. The Respondent's defenses

(1) The union organizers are "bona fide" applicants covered by the Act

The Respondent argues the General Counsel's case must fail because the union organizers were not "bona fide" applicants covered by the Act.[12] It first asserts that the union organizers submitted employment applications for the sole purpose of filing unfair labor practice charges without any expectation of actually being hired. I find that the evidence shows otherwise.

The evidence establishes that all of the union applicants followed the Respondent's normal application procedure. In particular, the overt union applicants diligently pursued employment by contacting the Respondent on several occasions to arrange interviews or to ascertain the status of their employment applications. In many, if not most, instances, the overt union applicants phoned and/or visited the Respondent's offices on several occasions. One applicant, Robert Bond Jr., even reapplied after being told that his initial application was no longer valid. The evidence therefore supports a reasonable inference that the union applicants were serious about obtaining a job with the Respondent.

The unrebutted evidence also shows that each overt union applicant would have accepted employment if offered a position. Each applicant testified that a Youth-to-Youth organizer is supposed to obtain employment with a nonsignatory contractor,

[11] Indeed, Harris was discharged by the Respondent no more than 4 weeks later.

[12] This argument encompasses all the union organizers, not just the 20 overt applicants.

do the best job possible to demonstrate the caliber of a union skilled worker, and explain the benefits of joining the Union to his coworkers during nonworking hours. If a Youth-to-Youth organizer does not obtain employment with a nonunion signatory, he is obligated to continue seeking employment until he is hired by a nonunion employer. Thus, contrary to the impression that the Respondent seeks to foster, the ultimate goal of the Youth-to-Youth program is for participants to become employed.

The Respondent also unpersuasively argues that the real intent of the overt union applicants was to "trap" the Employer into committing an unfair labor practice. In support of this argument, the Respondent relies on the evidence showing that each union applicant has filed numerous unfair labor practices when denied employment by other nonsignatory contractors. But that evidence does not prove an intent to entrap an employer because the enforcement of one's statutory rights does not necessarily translate into a less than bona fide attempt to obtain employment. Here, there is no evidence that the overt union applicants sought to provoke the Respondent into committing an unfair labor practice or that they in anyway inhibited the Respondent's ability to conduct its business.

Finally, the Respondent argues that the overt union applicants were not serious about seeking employment because they applied "overtly," that is, they revealed their union affiliation knowing that it would reduce the likelihood of being hired. Relying upon the candid testimony of several overt union applicants, who acknowledged that they did not believe that they had much of a chance of being hired overtly, the Respondent tacitly concedes that the only way for a union organizer to be hired would be to conceal his union affiliation. Having acknowledged as much, it is no surprise that only covert union organizers were hired by the Respondent and in most cases were quickly discharged after disclosing their union affiliation.

In *Town & Country Electric,* 516 U.S. 85 (1995), the Supreme Court endorsed the Board's position, enunciated in *Sunland Construction Co.,* 309 NLRB 1224 (1992); and *Ultrasystems Western Constructors,* 310 NLRB 545 (1993), that paid union organizers applying for jobs are statutory employees entitled to the protection of the Act. Relying on this precedent, and the evidence related above, I find that the union applicants, who applied overtly and covertly, were bona fide applicants for employment entitled to the protections of the Act.

(2) Employment as a union organizer did not conflict or interfere with the Respondent's work activities

The Respondent also argues that the participants in the Youth-to-Youth program are not entitled to the protections of the Act because their employment with the Union conflicted with their obligations as employees to the Respondent. It specifically asserts that the Union could direct union organizers to cease working for a nonunion employer or otherwise cause the nonunion employer to lose control over normal workplace tasks. In effect it argues that the union organizers are not protected by the Act because they could act in various ways adverse to the Respondent's interests.

This argument, however, was rejected by the Supreme Court in *Town & Country,* supra at 96. Relying on Section 226 of the Restatement (Second) of Agency, the Supreme Court noted that a union organizer's participation in a salting program did not necessarily result in an irreconcilable and disqualifying conflict of interest with his duties as an employee of a nonsignatory contractor.

In the context of this case, there is no evidence that participation in the Youth-to-Youth program interfered with the Respondent's ability to direct its day-to-day activities. To the contrary, the evidence shows that the covert union organizers hired by the Respondent, Harris, Banks, and Danforth, performed their jobs satisfactorily. Sommer complimented Harris and Banks for doing a good job, and Danforth was commended by Gober for doing good work in a timely fashion. Moreover, the unrebutted evidence discloses that the goal of the Youth-to-Youth program was to have the union organizers put forth their best effort to demonstrate their abilities and skills to the nonunion contractor. Thus, there simply is no evidence that the Union interfered or planned to interfere with the daily activities of the Respondent.

Nor is there evidence that the Union exerted "total control" over the decisions and actions of the Youth-to-Youth organizers. Although the Union arranged for Youth-to-Youth organizers to leave the apprenticeship program to seek employment with a nonunion contractor and often arranged for them to return to the same signatory contractors at the end of the 6-month program, the evidence shows that there were no hard and fast rules with respect to how long a person would work for nonsignatory contractor. Rather, several Youth-to-Youth organizers testified that a determination was made after the Youth-to-Youth organizer and the Union's chief organizer discussed how the organizing drive was progressing and that ultimately the decision of whether to stay or leave was left to the Youth-to-Youth organizer. The evidence also reflects that in some instances the union organizers worked for a nonsignatory contractor beyond 6 months. Moreover, the Board has held that paid union organizers are protected by the Act, even if they do not intend to retain their employment beyond the duration of an organizing campaign. *Sunland Construction Co.,* supra at fn. 33.

In the final analysis, the evidence does not show that the arrangement between the Youth-to-Youth organizers and the Union interfered or affected the daily activities of the Respondent or any other nonsignatory employer. I therefore find that union organizers, overt and covert, were employees entitled to the protections of the Act.

(3) The union organizers are not temporary employees

The Respondent also argues that it lawfully refused to hire the 20 overt union applicants because it has a policy against hiring temporary employees. Sommers believed that the Youth-to-Youth organizers would not work beyond 6 months and therefore he considered them temporary employees ineligible for hire. In support of its position, the Respondent cites *Sunland Construction Co.,* 309 NLRB 1224 fn. 33 (1992); and *Willmar Electric Service,* 303 NLRB 254 fn. 2 (1991), for the proposition that an employer may lawfully refuse to hire an individual who seek only temporary employment. But the underlying premise of the Respondent's argument is faulty because there is

no evidence that any of the overt union applicants involved with this case were seeking temporary employment. They did not tell any of the Respondent's front office personnel that they were seeking a temporary job. Nor did they testify that they were seeking a temporary position at the hearing.

Rather, the Respondent's argument is based on Sommer's assumption that the Youth-to-Youth organizers would not work more than 6 months because of something he heard a few contractors say several years earlier, and based on the statements of two overt union organizers, Christopher S. Carson and Bruce A. Manley, who are not involved in this case, but who told Gober in their employment interviews on May 6, 1997,[13] that they were only interested in temporary employment and that they would return to union jobs upon completing the Youth-to-Youth program. The Respondent also relies on the evidence adduced at trial that some Youth-to-Youth organizers worked short periods of time for nonunion contractors.

I am unconvinced by this evidence, standing alone or in the aggregate, that the 20 Youth-to-Youth organizers involved in this case were seeking short-term employment or that they would have quit working on or before 6 months, in the event they were hired, or they had not been discharged.

Moreover, the Respondent has not convincingly established that the refusal to hire was based on a neutral hiring policy, uniformly applied. Sunland Construction Co., supra. To begin with, there is scant evidence that a "temporary employee" policy existed prior to the time the Youth-to-Youth organizers sought employment with the Respondent. There is no evidence that the policy was openly promulgated and widely disseminated or that the Respondent's front office personnel even knew of its existence before Sommer told them not to hire the overt union employees because it was against company policy. Sommer did not state whether it was a verbal or written policy or explain how long it has existed or when it was put into effect. He provided no details other than to say that the policy exists and to briefly explain why. The lack of details supports a reasonable inference that the policy was "thought up" in order to thwart union organizing efforts.

Further, there is no evidence that the policy was applied to anyone other than the Youth-to-Youth organizers. The evidence shows that the Respondent hired several nonunion applicants who had "checkered" employment histories, marked by several brief periods of employment in a finite period of time, which clashes with a profile of a stable long-term employee. For example, William Goode, who was unemployed when hired by the Respondent as an installer on December 4, 1997, worked for four employers in the 7 months before he began working for the Respondent. (Jt. Exh. 3.) Javier Tovar, who also was unemployed when hired by the Respondent as an installer on December 3, 1997, had worked two jobs between 1995–1996, before quitting to return to Mexico.[14] Chad Mack, who was hired for the welding department, had worked 11 months between April 1996–February 1997; was out of work between February–July 1997, and returned to work in July 1997, before quitting in November to work for the Respondent. Thus, the evidence shows that notwithstanding the policy against hiring "temporary employees," the Respondent hired several nonunion applicants whose past employment did not project the image of a potential long-term employee.

The evidence further shows that many of the nonunion applicants hired in lieu of the union organizers quit not long after they were hired. The unrebutted evidence shows that between April–November 1997, the Respondent was forced by high turnover to hire 43 individuals to fill 25 jobs, which prompted Sommer to concede that many of the nonunion applicants hired "didn't stay very long." (Tr. 334.) And neither did many of the applicants hired before April 1997. The evidence shows that the Company had a high turnover rate before the union organizing began and therefore there were very few long-term employees. Thus, even if the Respondent had a rule against hiring temporary employees, the evidence shows that it was not uniformly applied, if applied at all, in the past.

I therefore find that the Respondent has not established that the 20 overt union organizers sought temporary employment, that the policy against hiring temporary employees, if it existed, was not uniformly applied in this instance or at all in the past. Accordingly, I find that the Respondent's reason for refusing to hire or consider for hire the 20 overt union applicants is pretextual. I therefore find that the Respondent violated Section 8(a)(3) of the Act.

5. Withdrawal of a job offer to Kurt Tucker

This is no dispute that Kurt Tucker was a union organizer, known to the Respondent, and that sufficient evidence exists, as shown above, that it harbored antiunion animus. The evidence also discloses that an offer of employment to Tucker was rescinded because he was a Youth-to-Youth organizer. Thus, ample evidence exists that the General Counsel has satisfied his *Wright Line* evidentiary burden.

The Respondent's reasons for rescinding its offer have changed over the course of time. The evidence discloses that at first Gober denied making an offer of employment to Tucker. Later, he stated that the offer was being rescinded because Tucker had a "communication" problem. Now the Respondent asserts that it rescinded the offer because Tucker was a temporary employee whose job with the Union interfered with his ability to work for the Respondent. As shown above, none of the assertions is supported by the evidence viewed as a whole. In light of the shifting positions and the paucity of evidence in support of its latest position, I find that but for Tucker's union activities he would have been employed by the Respondent. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by rescinding its offer of employment to Kurt Tucker.

6. The discharge of Eric Harris

Eric Harris was a covert union organizer, who revealed his union affiliation to Gober. One week later, Sommer told Harris that if he could steer clear of the Union, he would like to have him remain as an employee. One month later, Gober told Harris

[13] The record discloses that based on their statements in the employment interview, the NLRB's Regional Office dismissed the unfair labor practice charges of Carson and Manley.

[14] In addition to checkered employment histories, some of the new hires were inexperienced. Tovar and Goode had no prior experience as installers. Chad Mack had no welding experience, but was hired for the welding department.

that he would not receive a pay raise because of his union affiliation. A few days after that, Colvin told Harris that he was discharged, but if he would cut his ties to the Union, he would be considered for rehire. I find that the evidence supports an inference that Harris' discharge was motivated by antiunion animus.

The Respondent nevertheless argues that Harris was lawfully discharged because he falsified his employment application. As shown above, I found that the rule was announced and applied in a discriminatory manner. It therefore does not constitute a lawful reason for discharge. Thus, I find that the evidence taken as a whole supports a reasonable inference that the Respondent would not have discharged Harris in absence of his union activity.

The Respondent also asserts that Harris was discharged because he failed to obtain a CDL license. The Respondent states that Harris did not intend to get a license because his participation with Youth-to-Youth program was coming to an end and therefore he was planning to quit working for the Respondent. Contrary to the Respondent's assertions, the evidence shows that Harris had taken an eye examination, purchased eyeglasses, and had paid an extra fee in order to have his glasses express delivered, so he could take the CDL test. Thus, Harris was pursuing a course of action that would have resulted in obtaining the license had he not been discharged.

In addition, the evidence shows that the CDL license did not become an issue until after Harris announced that he was a union organizer. In the past, other installers who did not obtain a CDL license were transferred to the welding department. The same accommodation, however, was not extended to Harris. I therefore find that the Respondent's assertion that Harris was discharged because he did not obtain a CDL license is pretextual. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by discharging Eric Harris.

7. Unlawfully conditioning Harris' rehiring on his withdrawal from the Union

The undisputed evidence reveals that after Harris was discharged, Colvin told him that he would be considered for rehire, if he "cut his ties with the Union." The Respondent asserts that Colvin was implying that if Harris dropped out of the Youth-to-Youth program, he would no longer be viewed as a "temporary" employee and therefore he would be eligible for rehire. The attenuated argument is not supported by evidence.

Colvin was not called to testify by the Respondent. Thus, there is no evidence that he explained to Harris that if he withdrew from the Youth-to-Youth program, but remained a union member, he would be eligible for rehire. There is no evidence that he explained to anyone what he meant by what he said. The failure of the Respondent to call Colvin to explain what he said—or more importantly, what he meant to say—warrants an adverse inference that his testimony would not support the Respondent's post hoc interpretation of his comments. See *Francis House, Inc.,* 322 NLRB 516, 520 (1996). In short, Colvin said what he said, nothing more, nothing less. Given the timing of the statement and circumstances in which it was made, the evidence supports a reasonable inference that Harris was told that he would not be considered for rehire because of his protected union activities. I therefore find that Supervisor Colvin's statement violated Section 8(a)(1) of the Act.

8. The discharge of Frank Danforth

On Friday, October 3, Danforth was commended by his supervisor, Andy Colvin, for doing good work in a timely manner. On Monday, October 5, he was discharged 10 minutes after revealing that he was a union organizer. The timing of discharge standing alone supports an inference that it was motivated by antiunion animus.

The Respondent asserts that Danforth was lawfully discharged because he falsified his employment application and because he was a temporary employee. For the reasons previously stated, I find that Danforth was not a temporary employee and that the Respondent's reliance on its rule against falsifying employment applications is pretextual. I further find that the evidence supports a reasonable inference that had he not been a union organizer Danforth would not have been discharged. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by discharging Frank Danforth.

9. Unlawfully changing the hiring policy in response to union activity

The undisputed evidence establishes that on October 21, 1997, the Respondent added a cover sheet to its employment application advising prospective employees that all employment references would be verified. The evidence also establishes that this change in hiring policy was instituted solely because of the Union's organizing activity. While the change in hiring policy is neutral on its face, the evidence supports a reasonable inference that it was implemented with a discriminatory intent to thwart union organizing activity. I therefore find that the Respondent's policy change violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union organizers are bona fide employees within the meaning of Section 2(3) of the Act.

4. The Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) By announcing to the employees on July 22, 1997, that it would stringently apply a rule against falsifying employment applications.

(b) By telling employee Terry Banks on August 23, 1997, that he would not receive a pay raise because of his participation in the Union's organizing program.

(c) By telling employee Eric Harris, on August 25, 1997, that he would not receive a pay raise because of his participation in the Union's organizing program.

(d) By telling employee Eric Harris, on August 27, 1997, that he would be considered for rehire if he cut his ties with the Union.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) By refusing to hire or consider for hire the following applicants on the following dates:

Robert Bond Jr.	April 14, 1997, August 8, 1997
Kerry Bowling	April 14, 1997
Brian Campbell	April 14, 1997
M. John Maynard	April 14, 1997
David Walker	April 14, 1997
Charles M. Miller	May 14, 1997
Robert Reed	July 24, 1997
Monty Shoulders	July 24, 1997
Charles Baldwin	August 8, 1997
Christopher H. Meyers	August 8, 1997
Jason Wildrick	August 8, 1997
Spencer Irving III	August 11, 1997
Anthony Turner	August 11, 1997
William Rogers	September 23, 1997
Dennis Wheeler	September 23, 1997
Michael Crull	September 24, 1997
Travis Dick	September 24, 1997
Kurt Tucker	October 2, 1997
Mark Moran	October 21, 1997
Daniel W. Steward	October 21, 1997

(b) By applying in a stringent fashion a rule against falsifying employment applications.

(c) By discharging Eric Harris on August 27, 1997.

(d) By discharging Frank Danforth on October 6, 1997.

(e) By changing its hiring procedures on October 21, 1997, to add a cover sheet to all employment applications advising employment applicants that the Respondent will verify all reported employment references.

(f) By rescinding its offer of employment to Kurt Tucker.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the amended consolidated complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent refused to hire or consider for hire Robert Bond Jr., Kerry Bowling, Brian Campbell, M. John Maynard, David Walker, Charles M. Miller, Robert Reed, Monty Shoulders, Charles Baldwin, Christopher H. Meyers, Jason Wildrick, Spencer Irving III, Anthony Turner, William Rogers, Dennis Wheeler, Michael Crull, Travis Dick, Mark Moran, and Daniel W. Steward in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately offer these individuals full employment at rates paid to the individuals hired by the Respondent for the positions to which they applied or for which they would have been qualified to perform or, if such positions, no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges; and if necessary, terminating the service of employees hired in their stead, and to make the aforesaid individuals whole for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth, Co.,* 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Other considerations regarding the remedy and the specifics of the relief granted the job applicants which the Respondent refused to hire or consider for hire must wait until the compliance stage of the proceeding, see *Eldeco, Inc.*, 321 NLRB 857, 858 (1996).

Having found that the Respondent discriminatorily discharged Eric Harris and Frank Danforth, I shall recommend that the Respondent be ordered to immediately offer them full reinstatement without prejudice to their seniority or any other rights and privileges; if necessary, terminating the service of employees hired in their positions, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date a proper offer of reinstatement is made, as prescribed *F. W. Woolworth, Co.,* supra, less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* supra.

Having found that the Respondent discriminatorily rescinded its offer of employment to Kurt Tucker in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately offer him full reinstatement to the position that was offered to him without prejudice to his seniority or other rights and privileges; if necessary, terminating the services of any employee hired in his stead, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date Harris was scheduled to begin his new job, October 27, 1997, to the date a proper offer of reinstatement is made, less any net interim earnings, as prescribed *F. W. Woolworth, Co.,* supra, less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* supra.

[Recommended Order omitted from publication.]